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No. 90-198

In the
Supreme Court of the United States

OCTOBER TERM, 1990

ANNE ANDERSON, ET AL.,
PETITIONERS,

v.

BEATRICE FOODS CO.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Pursuant to Rule 15.7 of the Rules of the Supreme Court of the United States, petitioners call to the attention of the Court new matter directly bearing on the significance of the Rule 11 and sanctions issues raised by the petition for writ of certiorari.

In August, 1990 the Advisory Committee on the Civil Rules of the Committee on Rules of Practice and Procedure of the

Judicial Conference of the United States made a "Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules ("Call")." See 907 F.2d No. 2, CLXV, August 27, 1990; and *New York Times*, September 14, 1990, "Courts Rethinking Rule Intended to Slow Frivolous Lawsuits," at B18. Petitioners respectfully suggest that the "Call" by the Committee demonstrates that the Rule 11 and sanctions issues raised by the petition constitute "special and important reasons" under Rule 10 of the Rules of the Supreme Court of the United States justifying grant of the petition.

"In light of all the comment," the Committee has received concerning Rule 11 and related sanctions rules promulgated as part of the 1983 amendments to the Civil Rules, it "resolved to invite written public comments on the operation of the sanctions rules." "Call" at Supplemental Appendix (SA 5a-6a). The Committee "compiled a set of ten issues that have been called to its attention" regarding the present administration of Rule 11 and the sanctions rules. *Id.* at SA 6a. It invited the bench and bar to comment and provide specific proposals addressed to these issue areas. *Id.* at SA 6a-7a. The issue areas identified by the Committee directly implicate the Rule 11 and sanctions issues presented by the petition.

Issues identified by the Committee which are pertinent to the petition are:

> *Issue 1* — Whether the sanctions rules are serving their "aims in discouraging misuse of the Civil Rules," by punishing not just *pleading abuse* but *discovery abuse* as well (SA 7a);
>
> *Issues 4 and 5* — Whether "the sanctions rules have been administered unfairly to any particular group of lawyers or parties," "Do the sanctions provisions bear, for example, more heavily on plaintiffs' lawyers than defendants' lawyers" (SA 9a);

Issue 6 — Whether sanctions are so disproportionate to the conduct at issue that they result in "overdeterrence" or have a "chilling effect" on the pursuit of "meritorious claims" or "some particular category of claims" (SA 10a-11a);

Issue 7 — Whether the timing of the presentation and resolution of the sanction claim can cause injustice, "Sanctions motions made at the end of litigation may come as a surprise and a trap for the unwary that could be equally intimidating to others in later cases" (SA 12a);

Issue 8 — Whether the "procedures employed in sanctions matters" are "deficient" regarding the "right to hearing prior to sanction," Whether there should be "a more stringent standard of review than the abuse of discretion standard recently approved by the Supreme Court," There "has been sharp criticism of the failure" of "courts to inquire into the actual circumstances of a pre-signing investigation" (SA 12a-13a);

Issue 9 — Whether "the rule leaves more discretion with the district courts than is necessary or desirable, or perhaps tolerable" resulting in unpredictability, punitive consequences, and "injustice" (SA 13a); and

Issue 10 — Whether the application of the sanctions rules are consistent with each other, in particular, whether Rule 11 is being applied consistently with Rule 37 (SA 14a).

The "Call" by the Committee demonstrates that the Rule 11 and sanctions issues raised in this petition are of utmost concern to the bench, bar, and public. For this reason, petitioners re-

spectfully bring the Committee's "Call" to the Court's attention as further support for its petition.

Respectfully submitted,

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Dated: September 17, 1990

SUPPLEMENTAL APPENDIX

CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE
UNITED STATES

AUGUST, 1990

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COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

TO THE BENCH AND BAR:

The Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure has embarked upon a study of Rule 11 and related rules, and has requested that the bench and bar and the public generally, provide comments concerning the operation of the sanctions rules.

Written comment should be received in accordance with the attached description no later than November 1, 1990. All communications should be addressed to the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544.

Joseph F. Weis, Jr.
Chairman, Standing Committee on
Rules of Practice and Procedure

James E. Macklin, Jr.
Secretary

August 1, 1990

[Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure Omitted]

ADVISORY COMMITTEE ON THE CIVIL RULES
Judicial Conference Of The United States
July 24, 1990

CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES, AS AMENDED IN 1983

In 1983, Civil Rules 11 and 26 were amended to require the district courts to impose sanctions on lawyers or *pro se* litigants who sign pleadings, discovery motions, or other papers having no adequate foundation in law or fact. The purposes of these amendments were to discourage thoughtless or otherwise unjustified uses of the Civil Rules imposing cost, delay, and injustice on adversaries and to encoruage the exercise of professional responsibilty by lawyers signing papers. The amendments were made with the support of the American Bar Association.

Although a comparable sanction provision was set forth in Rule 37(c) of the original 1938 Civil Rules, and Congress had enacted in 1980 an important amendment to the sanctions provisions of 28 U.S.C. § 1927, the 1983 provisions were innovative. There is now a substantial and growing body of experience with these amendments. Over 1000 reported federal decisions have applied or construed the 1983 amendments. There have been several empirical studies of the operation of the rules, and others are now in progress. There is a substantial literature on the subject, as revealed in the bibliography appended to this Call. In addition, the Civil Rules Committee has received a wide variety of comments, some commending the 1983 amendments, others critical of them, and some proposing further revisions of the amended rules.

In light of all the comment, the Committee has resolved to invite written public comments on the operation of the sanc-

tions rules. To be most helpful to the Committee such comments should be brief and, if possible, based on data. Especially desired are specific recommendations responding to apparent problems.

The Committee will review the written comments received before November 1, 1990 at its meeting held at the end of that month. On the basis of that review, it will plan a hearing to be conducted in February, 1991 at which representative views may be presented and discussed. The Committee does not plan to give an audience to every individual who may wish to express a view, but will seek to select discussants who hold diverse positions with respect to the issues raised.

The Committee will also receive in early 1991 an empirical work done by the Federal Judicial Center at the request of the Committee. That report will be circulated to the bench and bar. Additional comment on that study will be welcome, and may be presented at the hearing.

The Committee will review any additional comments on that report as well as the presentations made at the hearing at its regular meeting to be held in late April, 1991. At that meeting, the Committee will consider any proposals for the revision of the sanctions rules. Revisions may be proposed for public comment, or the Committee may conclude to recommend no revisions next year. Or it is possible that the Committee may conclude that further discussions and hearings are in order.

To assist individuals or groups who wish to be heard on any aspect of the sanctions rules, the Committee has compiled a set of ten issues that have been called to its attention and on which comment would be particularly pertinent. The Committee hopes in part to reduce the need for redundant communications by summarizing ideas and suggestions that it has already received, but also it would especially welcome specific pro-

posals addressed to any of these issues that might call for correction. Among the questions to be considered by the Committee are:

1. Have the amendments served their aims in discouraging misuse of the Civil Rules to impose unwarranted expense, delay and other burdens on opposing parties and the courts? Do lawyers more frequently "stop and think" and conduct themselves with professional responsibility before signing pleadings and other papers that may produce unjustifiable burdens on the opposing party? There is now substantial empirical evidence that the amendment of Rule 11 achieved some of the intended effect.

An observation has been made, however, that the 1983 sanctions provisions have been used primarily in connection with alleged pleading abuses, although the ABA and the 1983 Committee were at least as concerned with discovery abuses. Perhaps the discovery abuse problem was overstated, or perhaps it has been remedied by the prophylactic effect of Rule 26(g), or perhaps the potential of that rule has not yet been realized by the bar. If the latter is the case, the Committee would welcome suggestions to enhance the effectiveness of Rule 26(g).

2. Has the financial cost in satellite litigation resulting from the imposition of sanctions perhaps exceeded the benefits resulting from any increased tendency of lawyers to "stop and think?" The Committee was in 1983 concerned about this cost.

It is clear that there have been many motions filed under the rules, and that some of these have themselves been the product of lawyers' failure to "stop and think." On the other hand, it is also clear that some excesses in sanctions motions were the product of the novelty of the rules; a "shakedown" period may have been necessary while lawyers and judges assimilated the innovation and learned to make proper use of it.

There is indeed a familiar phenomenon, illustrated by experience with previous revisions of the Federal Rules of Civil Procedure, of a bell-shaped curve of litigation activity responsive to rule change: the activity peaks and then declines to normality as the profession's understanding of the rule is stabilized.

If there is generalized overuse of motions for sanctions that seems likely to continue, are there appropriate amendments that could be made to correct that excess? One proposal on which comment would be welcome is that motions for sanctions might be entertained only by leave of court; it is perhaps questionable whether such a requirement would effect a real economy in the use of the rule, given that the court may often be unable to decide the issue of leave without considering the merits of the sanctions issue. A variation on this suggestion is to eliminate the requirement of leave when the court enters summary judgment or judgment on the pleadings. A third suggestion, also bearing perhaps on other issues arising under the rule, is to require some form of peer review of all motions for sanctions, although this idea lacks sufficient detail to be appraised.

3. Is there an incremental injury to the civility of litigation that results from lawyers impugning one another's motives and professionalism, and seeking to impose burdens directly on one another? Or does the filing of a sanctions motion more often reflect the frayed relations between counsel already existing because of the unprofessional conduct giving rise to the motion?

To some extent, the risk of personal offense to lawyers is inherent in the use of such devices, including such other provisions as those set forth in Rule 37. A decline in the quality of professional relations may, however, result from other aspects of the professional culture, such as changing attitudes towards cooperation, collegiality, and mutual respect.

The frequency of such offenses may have diminished as the bar has become accustomed to the practice. Here, too, the phenomenon of the bell-shaped curve may be functioning.

If injury to professional morale is a continuing problem, would it be helped by requiring an initiative of the court as a predicate to consideration of a sanctions motion? By a system of peer review? Comment on these suggestions or others that might be devised would be welcomed by the Committee.

4. Is there evidence that the sanctions rules have been administered unfairly to any particular group of lawyers or parties? Particular concern has been expressed about the effect on civil rights plaintiffs. Bearing in mind that some categories of cases are extremely unlikely to result in sanctionable conduct (actions by the United States to recover on student loans being an example), it cannot be expected that sanctions will be equally distributed among all categories of federal civil litigation. Data may be subject to conflicting interpretations.

If this is a problem, could an amendment of the Rules alleviate or eliminate it? The Committee would welcome suggestions.

5. It has been suggested that there may be a risk of unfairness to groups even if the sanctions rules are administered with unexceptionable even-handedness by the courts. Such unfairness could accrue from differences in the circumstances of parties and lawyers.

Do the sanctions provisions bear, for example, more heavily on plantiffs' lawyers than defendants' lawyers? There is some evidence suggesting that courts may be slower to sanction the signing of an answer than a complaint. One suggestion responsive to this concern has been to amend the time for answer under Rule 12 in order to permit more extensive "reasonable inquiry" by defendants. Comment on this suggestion or others addressed to the issue would be welcome.

Differing systems of professional compensation may also cause differences in effects of sanctions on lawyer conduct. Perhaps a *pro bono* lawyer may be more affected by the threat of evenly-administered sanctions than a lawyer representing a client willing and able to invest great resources to wear down a financially weak adversary, and to bear the cost of any sanctions imposed. It seems unlikely that the sanctions provisions deter misconduct by *pro se* litigants for they could but rarely be compelled to pay them. A pertinent proposal has been that attorneys should not be permitted to pass the cost of sanctions on to their clients, or even to liability insurers. Comment on that proposal or others addressed to the issue would be welcome.

6. Concern has also been expressed about the appropriateness of the size of some sanctions imposed under the rules. It is true that large sums have been paid to compensate the full amount of necessary legal expenses incurred as a result of conduct determined by a court to be unprofessional. It has been urged that to require a lawyer to bear the adversary's full legal expenses through discovery and trial because of the lawyer's signing of a pleading with inadequate pre-signing investigation could in some cases be excessive, resulting in "over-deterrence" causing lawyers to be reluctant to assert even marginally well-founded contentions for fear of a sanction colossal in relation to potential benefit to the client served. This effect could combine with that previously stated; large sanctions may be more likely to over-deter lawyers of modest resources, or small firms, than large firms better able to distribute the risk of occasional large sanctions.

In response to this concern, it has been the practice of some courts to favor the use of non-financial sanctions where those may be effective to deter misconduct, because they fall more evenly on lawyers of differing financial means. On the other hand, the aim of the sanctions provisions is to induce lawyers

to take into account the unjust consequences of a sanctionable act; those consequences can forseeably include costs that are disproportionate to any advantage the lawyer may have gained by the misdeed. Moreover, the benefit perceived by the client served by a sanctionable act may in some cases literally be the cost actually inflicted on the adversary by the unprofessional conduct of the lawyer. Is there evidence or experience to illuminate this possible concern for "over-deterrence?" If this is a real problem, what solutions are available?

These concerns for over-deterrence embody the related concern that the rule may have a "chilling effect" on the assertion of meritorious claims or defenses generally, or of some particular category of claims or defenses. The 1983 Committee was concerned about such an effect, particularly with respect to the assertion of novel legal theories. The Committee cautioned courts about sanctioning the assertion of such theories. Has the caution been appropriately observed by the district courts? Are there "chilling effects" that can specifically be identified?

One proposal responding to the problems of over-deterrence or chilling effect has been that sanctions should be limited to the purpose of deterrence only, without attempting full compensation of the aggrieved party. Another proposal has been that a party seeking sanctions should be required to show timely notice to the erring opponent that the latter was in violation; this would reduce the risk of over-sized sanctions coming as a surprise to offending counsel.

Another suggestion has been that sanctions should not be imposed on a party or attorney for signing a pleading having sufficient foundation to result in a trial on the merits. This would have the incidental effect of limiting liability for improper certification of a pleading to the expenses associated with securing a summary judgment or a judgment on the pleadings. It is argued in opposition to this proposal that the standard for summary judgment is too forgiving, resolving every doubt in favor of the opposing party. Moreover, there are many cases

in which a trial on the merits may be less costly than summary adjudication.

7. Some of these latter suggestions relates to a concern that can be separately stated regarding the timing of the presentation and resolution of sanctions claims. It has been suggested that some strong defendants have used Rule 11 to intimidate weaker plaintiffs' counsel and to drive a wedge between counsel and client by creating a situation in which counsel has significant self-interests to protect while representing clients. The means to achieve this result is an early motion for large sanctions against the attorney. A suggested response to this problem is to prohibit the making of early sanctions motions, but this conflicts with the aim of affording a sanctioned party or attorney with a full opportunity to avoid the harm. Sanctions motions made at the end of litigation may come as a surprise and a trap for the unwary that could be equally intimidating to others in later cases. Is there a proper time or occasion that could be specified for the consideration of the sanctions issue? Comment on this question would be welcomed by the Committee.

8. Some observers have regarded the procedures employed in sanctions matters to be deficient. It has been contended that the failure to provide a formal structure to the proceeding may have resulted in dispositions of sanctions issues that have been too summary.

Some proposals for revisions of the rule call for a right to hearing prior to sanction, for a requirement that sanctions be based on findings and conclusions, and that there be a more stringent standard of review than the abuse of discretion standard recently approved by the Supreme Court. Perhaps a revision of the sanctions rules should make provision for a more rigorous procedure. Yet, perhaps it is sufficient in many cases to have the kind of submissions on papers contemplated by Rules 43 and 78.

The extent of the procedure suitable to the sanctions decison may turn in part on the appropriateness of inferences of inadequate investigation drawn from the outcome: if a court is justified in concluding that a bad lawyer product must be the result of bad lawyer investigation, then less procedure is needed. Some courts have approached sanctions in just this way, and there has been sharp criticism of the failure of such courts to inquire into the actual circumstances of a pre-signing investigation. Should the rules address that issue?

Comment and specific suggestions for procedural modifications would be of interest to the Committee.

9. As noted above, it has been argued that the rule leaves more discretion with the district courts than is necessary or desirable, or perhaps tolerable. At the same time, it has also been proposed that the 1983 amendments were too mandatory in language, that "may" should be substitued for "shall" in Rule 11. Comment on that proposal would be welcome.

The Civil Rules have generally favored judicial discretion as a means to secure just results and have avoided procedural rigidity. On the other hand, indeterminacy in the sanctions rules can weaken their instructive value. The conduct of lawyers and litigants is less likely to be influenced by a rule that is unpredictable in application. There may also be a greater injustice associated with a relatively indeterminate rule that gives rise to punitive consequences. Indeterminacy can also increase "occasional" injustice, as where sanctions reflect a bad relationship between the court and an attorney or litigant.

Is the existing law of sanctions too determinate or indeterminate? Is there data or experience to support either conclusion? One measure of indeterminancy would be a very high degree of difference amongst the individual district judges in the frequency of application of sanctions. On the other hand, such differences amongst individual judges have been closely observed by many lawyers for many decades, and the system has accommodated to them in large measure.

Can the indeterminacy of the rule be diminished? The Committee would welcome suggestions to make the sanctions rules more explicit in order to enable the judges to be more predictable and even handed in their application if this can be done without causing other perhaps more arbitrary results. At the same time, the Committee is aware of its own inherent limitations; efforts to be more explicit than the subject of the rule will admit are likely to be counterproductive.

10. Concern has been expressed about the relation of the 1983 sanctions rules to related provisions of federal procedure.

Are the sanction rules inconsistent with 28 U.S.C. § 1927? With substantive fee-shifting statutes? With F.R. Civ. P. 37? It has been suggested that there are incongruities and that there are an excessive number of overlapping provisions. The Committee would welcome comment and suggestions with respect to the relationship amongst these several sources of sanctions law.

[BIBLIOGRAPHY OMITTED]